

NTSB Order No. EA-4306

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of December, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

v.

JEFFREY A. CROY, and
DONNIE WARREN RICH,

Respondents.

Dockets SE-13338
SE-13356

OPINION AND ORDER

Respondent Rich has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on March 2, 1994, following an evidentiary hearing. ¹ The Administrator has appealed as well. The basis for the Administrator's complaint was a November 15, 1992 flight taken by both respondents from Nashville to Memphis and return. On the flight

¹The initial decision, an excerpt from the hearing transcript, is attached.

to Memphis, there were two passengers, employees of a local TV station. The Administrator charged both respondents with transporting passengers for compensation or hire without having the necessary authority or credentials. The law judge affirmed the Administrator's order, in part, on finding that respondent Rich had violated 14 C.F.R. 135.5, 135.115, and 135.293(a) and (b), and that respondent Croy had violated 14 C.F.R. 135.115, and 135.293(a) and (b). ² The law judge declined to find, as alleged by the Administrator, that respondent Rich had also violated § 135.299 and § 135.343, or that respondent Croy had also violated § 135.5 and 135.343. ³

Respondent Rich appeals the findings made against him. He claims that he was merely giving respondent Croy flight instruction and had no knowledge of any arrangement with the passengers. The Administrator appeals the law judge's refusal to affirm all the regulatory violations in the Administrator's complaint, and appeals the sanction reductions ordered by the law judge. ⁴ We deny respondent's appeal and grant that of the Administrator only to the extent that we reinstate the various Part 135 charges against respondents. We are not convinced that an increase in the suspension periods imposed by the law judge is

²These rules are reproduced in the attached Appendix.

³See Appendix.

⁴The law judge imposed a 30-day suspension of his airman certificate on respondent Croy and a 45-day suspension on respondent Rich. The Administrator had sought 90-day suspensions for both. Neither respondent replied to the Administrator's appeal.

appropriate or consistent with precedent.

1. Respondent Rich's appeal. Respondent Rich (hereinafter, in this section of our opinion, respondent) makes two claims of error: first, that the record does not support the necessary finding that the flight was for compensation or hire; and second, that the Administrator failed to prove that respondent had any knowledge of the "compensation or hire" arrangement. We address each in turn.

a. Part 135 compensation or hire. There is a clear public interest in ensuring that only properly certificated commercial operators perform commercial services. Administrator v. Carter, NTSB Order EA-3730 (1992). Although an exception has been created to permit certain operations under Part 91, where passengers contribute to the flight cost, to be performed without compliance with the stringent training and proficiency rules of Part 135, that exception is a narrow one. Otherwise, stricter rules in Part 135 (concerning for-hire operations generally in smaller aircraft) apply. See 49 C.F.R. 135.1 and Administrator v. Sabar, 3 NTSB 3119, 3120 (1980). Expenses may be shared only where the pilot and the passengers share a common purpose in the flight. Notably relevant here, in Administrator v. Reimer, 3 NTSB 2306 (1980), we found that there was no common purpose in a pilot sharing expenses with passengers, when the pilot's purpose was to gain flight time and the passengers' purpose was to skydive.⁵

⁵See also Carter, supra.

The matter of actual compensation also is not critical to finding that Part 135, rather than Part 91, applies. Even if the pilot receives no payment, if there is no common purpose, the flight would violate Part 135. Administrator v. Hagerty, NTSB Order EA-3549 (1992) (respondent found to have operated possible medical emergency flight for compensation or hire even though he was not compensated). See also Administrator v. Chadwell, NTSB Order EA-3699 (1992). And, as we said in Hagerty, pilots may not avoid liability simply by not asking any questions. They have a reasonable duty to inquire into the status of the flight and the passengers.

In this case, it is clear that Part 135 applies and that this flight was for compensation or hire. Although there is considerable disagreement regarding who actually set up the flight, the record shows that an invoice was prepared. Mr. Croy attempted to structure the flight as one with shared expenses. However, he did not correctly understand the law and, in any case, it is not clear on the record that his proposal was accepted by the TV station (although it is clear that the station expected to pay something for the flight). In any case, as demonstrated above, the shared expenses exception to applicability of Part 135 does not apply here, as there was no common purpose in the flight. Even giving respondents the benefit of the doubt regarding the violation, respondent Croy's intent was to obtain flight instruction, and respondent Rich's intent was to provide that instruction. The TV crew's intent was

to get to Memphis as quickly as possible to attend a press conference.

2. Respondent's culpability. Respondent does not dispute on appeal that he was the pilot-in-command of this flight, and we confirm that he was, being the only pilot on board who was qualified to operate the aircraft. As such, and with exceptions not pertinent here, he was responsible for the lawful operation of the aircraft. According to his testimony, he entered the aircraft prepared only to give respondent Croy multi-engine flight instruction. Yet, when he saw the two passengers -- strangers to him -- he failed to ask any questions of them or of Mr. Croy regarding their status in the aircraft. This is not the standard of care demanded of a commercial pilot and flight instructor, nor is it acceptable for a flight instructor to believe (wrongly) that, if the passengers were paying for the aircraft rental, the flight would not be subject to Part 135 (see Tr. at 143).

Even if he honestly believed that the flight was not subject to Part 135, his actions would not be excused. The test applied to his behavior is whether he knew or should have known. Hagerty, supra. As we noted in Chadwell, an unsuspecting paying passenger should not be expected to understand the differences between Part 91 and Part 135 operations, and the more stringent testing and training requirements of the latter.

2. The Administrator's appeal.

a. Respondent Rich. The Administrator appeals the law

judge's dismissal of the § 135.299 and 135.343 charges against Mr. Rich. The Administrator argues that the law judge was wrong in finding these sections redundant of § 135.293(a) and (b). Finding the regulations redundant could affect the severity of the sanction imposed. It does not, however, justify dismissal of the charge if its elements have been proven. Once the lack of a Part 135 certificate has been proven, respondents automatically stand in violation of the various training and testing requirements established to ensure the skill levels required of Part 135 pilots. Accordingly, we find that respondent Rich also violated § 135.299 and 135.343.

b. Respondent Croy. The law judge dismissed charges that Mr. Croy violated § 135.5 and § 135.343. For the reasons addressed above, we grant the appeal regarding the latter. We also cannot agree with the law judge's reasoning regarding § 135.5 (that Mr. Croy did not operate the aircraft), as the law judge specifically found that he had manipulated the controls. The term "operate" in the rules does not mean, as the law judge apparently believed, that Mr. Croy was the "operator," in the sense that he was an air carrier. Section 135.5 prohibits any "person" from operating an aircraft under Part 135 without the proper authority. The law judge found, and we here affirm, that the flight was a 135 flight. It follows that respondent Croy, who flew the aircraft, was a person operating it without the proper authority.

c. Sanction. The Administrator seeks reinstatement of his

original suspension periods of 90 days for each respondent. However, the cases he cites to support that result do not, in our view, do so. In Administrator v. Poirier, 5 NTSB 1928 (1987), although a 90-day suspension was imposed, respondent's actions were considerably more egregious in that, knowing the applicable Part 135 certificate had been revoked, he evaded FAA inspectors by operating a different aircraft from a different airport. Administrator v. Walton, 6 NTSB 419 (1988), as with Poirier, involves suspension of airline transport pilot certificates (under which an even higher standard of care attaches), and involved an established Part 135 operation for which the respondent should have exercised greater care to monitor his business arrangements. Walton, moreover, specifically indicates that suspensions for limited unlawful carriage of persons or property for compensation or hire range from 20 to 90 days.

Finally, and as we have stated on many recent occasions since enactment of the FAA Civil Penalty Administrative Assessment Act of 1992, P. L. No. 102-345, Administrator v. Muzquiz, 2 NTSB 1474 (1975), also cited by the Administrator, no longer is sufficient to warrant automatic affirmance of the sanction suggested by the Administrator where all violations alleged in the complaint are proven. See, e.g., Administrator v. Oklahoma Executive Jet Charter, Inc., NTSB Order EA-3928 (1993).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted to the extent set forth in this decision; and
3. The 45-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.⁶

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

§ 135.5 Certificate and operations specifications required

No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part, or, for operations with large aircraft having a maximum passenger seating configuration, excluding any pilot seat, of more than 30 seats, or a maximum payload capacity of more than 7,500 pounds, without, or in violation of, appropriate operations specifications issued under part 121 of this chapter.

§ 135.293 Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas-

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for-

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes of this paragraph, type, as to a helicopter, means a basic make and model.

§ 135.299 Pilot in command Line checks: Routes and airports.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly. The flight check shall-

(1) Be given by an approved check pilot or by the Administrator;

(2) Consist of at least one flight over one route segment; and

(3) Include takeoffs and landings at one or more representative airports. In addition to the requirements of this paragraph, for a pilot authorized to conduct IFR operations, at least one flight shall be flown over a civil airway, an approved off-airway route, or a portion of either of them.

§135.115 Manipulation of controls.

No pilot in command may allow any person to manipulate the flight controls of an aircraft during flight conducted under this part, nor may any person manipulate the controls during such flight unless that person is-

(a) A pilot employed by the certificate holder and qualified in the aircraft; or

§ 136.343 Crewmember initial and recurrent training requirements.

No certificate holder may use a person, nor may any person serve, as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service. This section does not apply to a certificate holder that uses only one pilot in the certificate holder's operations.